91-567

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

TERRY LEE WALTON,

Petitioner,

versus

THE STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari
To The Supreme Court Of The State Of Georgia

PETITION FOR A WRIT OF CERTIORARI

VIRGIL L. BROWN
BENTLEY C. ADAMS, III
Petitioner's Attorneys

P.O. Box 388
Courthouse Square
Zebulon, Georgia 30295
(404) 567-8970
(404) 567-3013 (Fax)
(404) 525-2373 (Atlanta)

October 1, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Was petitioner denied due process where he was tried before a non-lawyer judge and no de novo review of the conviction was afforded under Georgia's appellate review system.

2. Was petitioner denied due process where he was tried without a jury and there was no showing that he had ever made a knowing and intelligent waiver of the right to be tried by a jury?

3. Was the Georgia Supreme Court's finding that petitioner was entitled to no de novo review of his conviction and petitioner's right to a trial by jury was impliedly waived by his failure to object to proceeding to trial without a jury a prohibited ex post facto application of these procedural requirements?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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No. _____

In The

Supreme Court of the United States

October Term, 1991

TERRY LEE WALTON,

Petitioner,

versus

THE STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR A WRIT OF CERTIORARI

Petitioner Terry Lee Walton prays that the Writ of Certiorari issue to the Georgia Supreme Court to review the decision of the Georgia Supreme Court entered July 3, 1991.

OPINIONS BELOW

Reproduced in the appendix to this petition are (1) the decision of the Georgia Court of Appeals dated September 26, 1990, (2) the decision of the Georgia Supreme Court dated January 8, 1991 granting certiorari, (3) the decision of the Georgia Supreme Court dated June 11, 1991, (4) the order of the Georgia Supreme Court denying

petitioner's Motion for Reconsideration dated July 3, 1991, and (5) the July 3, 1991, order of the Georgia Supreme Court granting petitioner's Motion for Stay of the Remittitur. The Georgia Court of Appeal's decision is reported at 197 Ga. App. 263, 398 S.E.2d 221 (1990). The Georgia Supreme Court's decision is reported at 261 Ga. 392, ___ S.E.2d ___ (1991).

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a) which authorizes the grant of the Writ of Certiorari to the highest court of a state in a case where a right, privilege or immunity is specifically claimed under the Constitution of the United States. The Georgia Supreme Court denied petitioner's timely Motion for Reconsideration on June 26, 1991. In accordance with Rule 13(1) & (4) of this court, this petition is filed within ninety (90) days of the entry of the Judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, 6th Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States, Article 1, §9, Paragraph 3:

No Bill of Attainder or ex post facto Law shall be passed.

Constitution of the United States, Article 1, §10, Paragraph 1:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letter of Marque and Reprisal; coin Money; emit Bills of Credit; make any thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law; or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

STATEMENT OF THE CASE

Terry Lee Walton was convicted after a bench trial of Driving While Under the Influence of Alcohol in the Probate Court of Upson County. The judge who presided at Petitioner's trial was not a member of the bar. Petitioner was not advised of his right to a trial by jury and no express waiver of the same was made by him. He appealed his conviction pursuant to the provisions of O.C.G.A. §40-13-28 to the Superior Court of Upson County which remanded the case due to the lack of a written waiver of trial by jury. He appealed this decision to the Georgia Court of Appeals contending the superior court should have reversed the conviction because a "de novo" review of the record showed insufficient evidence to support the conviction. The superior court's decision was reversed by the Court of Appeals which held the superior court should have conducted a de novo trial in the matter rather than a review on the record. Petitioner sought and obtained certiorari from the Georgia Supreme Court. That court again reversed, holding the waiver of jury trial issue was impliedly waived by failing to object to the bench trial in the trial court and that no de novo review is available under O.C.G.A. §40-13-28.

REASONS FOR GRANTING THE WRIT

1. The De Novo Review Issue:

In this case the petitioner's direct state appeal was taken under the provisions of O.C.G.A. §40-13-28. It provides:

> Any defendant convicted under this article shall have the right of appeal to the superior court. The provisions of Code Sections 5-3-29 and 5-3-30 shall not apply to appeals under this Code Section. Otherwise, the appeal shall be entered as appeals are entered from the probate court to the superior court, provided that the defendant shall be entitled to bail and shall be released from custody upon giving the bond as is provided for appearances in criminal cases in the courts of this state. Such bond shall have the same conditions as appearance bonds in criminal cases. The appeal to the superior court shall be on the record of the hearings as certified by the judge of that court who presided at the hearing below.

In *Anderson v. City of Alpharetta*, 187 Ga. App. 148, 369 S.E.2d 521 (1988), the court clarified the parameters of the review afforded under this statute:

> O.C.G.A. §40-13-28, having eliminated the jury feature of an appeal to the superior court, then provides that the appeal "shall be on the record of the hearing as certified by the judge of that court who presided at the hearing below." Thus, it is the superior court itself, rather than a jury, which is charged with the fact-finding responsibility. Rather than rehearing the evidence, the superior court conducts a review of the record of the lower court hearing, and, after conducting such a review, the superior court, as trier of fact, makes its own determination as to guilt. Thus, the superior court does make a de novo finding as to guilt vel non, in much the same manner as the Full Board of Workers' Compensation reviews the awards of administrative law judges, the obvious difference being that the

> superior court, unlike the Full Board, is not authorized to rehear the actual evidence.

Anderson, 187 Ga. App. at 149 (emphasis supplied).

The characteristics of a §40-13-28 "de novo" appeal were made even clearer in *Holloman v. The State*, 199 Ga. App. 230, ___ S.E.2d ___ (1991). There, appellant was convicted of D.U.I. and speeding in the probate court. He took a §40-13-28 appeal to the superior court. The superior court, noting there was no transcript of the probate court proceedings, affirmed the conviction finding "the probate court's judgment must be assumed to be correct." The Court of Appeals initially affirmed then on rehearing reversed the superior court decision. In so holding the court stated:

> The trial court, citing *Mindock v. State*, 187 Ga. App. 508 (1) 370 S.E.2d 670 (1988), presumed that the verdict of the probate court was correct since there was no transcript reflecting evidence to the contrary. We conclude that the trial court did not accord appellant the de novo review to which he was entitled. See generally *Judd v. Valdosta/Lowndes County Zoning Bd. & Co.*, 147 Ga. App. 128 (1b) (248 S.E.2d 196) (1978). Therefore, we remand this case to the superior court for a de novo proceeding to be conducted.

Holloman, 199 Ga. App. at 230.

In petitioner's case, however, the Georgia Supreme Court rejected the logic of these decisions:

> We disagree with the Court of appeals' construction of this statute, and expressly disapprove of language in the case indicating the appeal to the

> superior court is a "de novo proceeding." In enacting O.C.G.A. §40-13-28, the General Assembly provided for a right of appeal "on the record" to the superior court. Thus, the mandate of the superior court is to review asserted errors of law in the proceeding below under general appellate principles.

The Georgia Supreme Court's decision on this issue is in sharp conflict with this court's decision in *North v. Russell*, 427 U.S. 328 (1976). In *North* the court held an accused, subject to possible imprisonment, is not denied due process when tried before a non-lawyer inferior court judge provided a later trial de novo is available under Kentucky's two-tier court system. In so holding the court found it significant that,

> In all instances, a defendant in Kentucky facing a criminal sentence is afforded an opportunity to be tried *de novo* in a court presided over by a lawyer-judge since an appeal automatically vacates the conviction in [the lower] court.
>
> *North*, 96 S.Ct. at 2712.

Moreover, the court reiterated its earlier observations in *Colton v. Kentucky*, 407 U.S. 104 (1972), that such trials satisfy due process because:

> "The right to a new trial is absolute. A defendant need not allege error in the inferior court proceeding. If he seeks a new trial, the Kentucky statutory scheme contemplates that the slate will be wiped clean. [cits omitted]. Prosecution and defense begin anew. . . . The case is exactly as if it had been brought there in the first instance."
>
> *North*, 96 S.Ct. at 2713.

The decision in this case runs afoul of *North* and *Colton* and serves to eliminate perhaps the only feature of O.C.G.A. §40-13-28 which was its saving grace. Tried before a non-lawyer judge, due process requires that he be afforded a de novo review of that conviction. However, even assuming arguendo the Georgia Supreme Court's construction of the de novo provisions of §40-13-28 is correct, due process considerations should prevent the application of that interpretation to persons tried before that procedural rule was announced. Accused persons should be entitled to rely on the clear language of the statute and the previous judicial decisions interpreting that statute in promulgating an appeal. To apply the procedural changes wrought by this decision to persons so situated violates the fair warning requirements of the constitutional ex post facto prohibitions contained in Article I, Sections 9 and 10 of the United States Constitution. This prohibition by virtue of the due process clause bars state courts as well as legislative bodies from passing laws with retroactive effect See *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

2. The Jury Trial Waiver Issue:

In this case the Georgia Supreme Court also applied an unexpected and novel construction to the terms of O.C.G.A. §40-13-23(a) which provides:

> No court defined in this article shall have the power to dispose of traffic misdemeanor cases as provided in this article unless the defendant shall first waive in writing a trial by jury. If the defendant wishes a trial by jury, he shall notify the court and, if reasonable cause exists, he shall

> be immediately bound over to the court in the county having jurisdiction to try the offense, wherein a jury may be empaneled.

At the time of petitioner's conviction and throughout all but the final stage of his appeal in the state system, this statutory provision was rigidly applied by the Georgia courts as a jurisdictional prerequisite in inferior court trials such as the one had by petitioner.

For example, in *Rustin v. State*, 192 Ga. App. 775, 386 S.E.2d 535 (1989), the court held a probate court's failure to first advise a defendant of the right to a jury trial and to obtain his written waiver of a trial in a traffic misdemeanor case, as required by the above statute, is harmful error requiring a reversal of a D.U.I. conviction.

In the subsequent decision in *Snellings v. State*, 194 Ga. App. 552, 391 S.E.2d 36 (1990), the court recognized the written jury trial waiver as a jurisdictional prerequisite and held that even where a defendant orally waives a jury trial the conviction is void unless the court obtains the waiver in writing.

Similarly, in *Davis v. State*, 197 Ga. App. 746, 399 S.E.2d 554 (1990), the court held the appellant's D.U.I. conviction was "a mere nullity" where no written waiver was obtained in the probate court. Importantly, the *Davis* court held that although the written waiver issue had not been raised in the superior court below this was of no consequence. Citing *Barrett v. State*, 183 Ga. App. 729, 360 S.E.2d 400 (1987), the court noted "this is a matter which goes to the subject matter jurisdiction of the probate court and the right to attack the judgment as a nullity is not waived by the failure to attack it before". *Id.*, at 747. See

also *Kendall v. State*, 196 Ga. App. 760, 396 S.E.2d 927 (1990).

The reasoning of this line of cases was rejected for the first time by the Georgia Supreme Court in *Nicholson v. State*, 261 Ga. 197, 403 S.E.2d 42 (1991), on April 11, 1991 while petitioner's case was on appeal. In *Nicholson* the court granted certiorari to determine whether the failure of a probate court to obtain a waiver of jury trial can be raised for the first time in an appellate court. In concluding it could not, the court focused on the language of §40-13-23(a) and §40-13-21(a) and (b). By a rather convoluted reasoning the court found §40-13-21, not §40-13-23 governed jurisdiction in the probate courts. This is true, the court reasoned, because probate courts are not "defined" in §40-13-20 (includes "municipal courts"). Accordingly, probate courts are not bound by the written waiver of jury trial requirement of §40-13-23(a). And although §40-13-21(b) vests misdemeanor traffic offense jurisdiction in probate courts only where "the defendant waives a jury trial . . . ", there is no written waiver requirement. Therefore, for this reason and because the matter is one of jurisdiction over the person as opposed to subject matter jurisdiction, the waiver could be implied by a failure to object to the lack of a jury in the probate court. In petitioner's case the Georgia Supreme Court relied upon *Nicholson* in reaching its decision.

Justices Smith, Bell and Benham dissented in *Nicholson*. In the dissent Justice Benham argued forcefully the result reached by the majority was contrary to the clear and unambiguous language contained in §40-13-21(b) that probate courts are without "jurisdiction" to try traffic offenses unless "the defendant waives

a jury trial". He points out that under the provisions of O.C.G.A. §17-9-4 "[t]he judgment of a court having no jurisdiction of the *person or subject matter,* or void for any . . . cause, *is a mere nullity* and may be so held in any court when it becomes material to the parties to consider it." (emphasis supplied).

The *Nicholson* majority also relied on *Fortson v. State,* 96 Ga. App. 350, 100 S.E.2d 129 (1957), and *Green v. Auston,* 222 Ga. 409, 150 S.E.2d 346 (1966), in reaching its result. The reliance was misplaced.

Green was not a criminal case. Hence, there was no 6th Amendment right to a trial by jury in criminal prosecutions implication. Moreover, the case dealt with a *superior court* trial and turned on the presence of a state constitutional provision which actually required the parties to demand a jury trial. No such provision was applicable in *Nicholson* or in the petitioner's case.

Fortson involved an effort by a defendant to set aside a guilty plea on the ground that he was denied his right to counsel. The opinion recites the defendant was offered counsel but gave no indication that he desired an attorney. Certainly, the implication of waiver is more appropriate in those circumstances than in *Nicholson* and the matter sub judice where petitioner pled *not guilty* and proceeded to trial not expressly waiving any of his rights. The record in this case does not indicate the petitioner was at any time advised of his right to a trial by jury.

Importantly, the Georgia Supreme Court's holding in this case is sharply at odds with the decision of this court

in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the subsequent decisions following it which have strongly disapproved of implied waivers in constitutional analysis. In *Boykin* this court held "after a prisoner raises the question of the validity of his plea of guilty, the burden is on the state to show that the plea was intelligently and voluntarily entered." *Conlogue v. The State*, 243 Ga. 141, 141, 253 S.E.2d 168 (1979), quoting from *Roberts v. Greenway*, 233 Ga. 473, 211 S.E.2d 764 (1975). The record must *affirmatively reflect* that the guilty plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. *Purvis v. Connell*, 227 Ga. 764, 767, 182 S.E.2d 892 (1971). Similarly, the record must show that the defendant was offered counsel and *intelligently and understandingly rejected the offer.* Anything else is not a waiver. *Purvis* at 766. A knowing and intelligent waiver is an act which can never be lightly presumed and, indeed, the *presumption is against waiver. Campbell v. State*, 128 Ga. App. 74, 195 S.E.2d 664 (1973). This rule has been consistently applied by the Georgia court to jury trial waivers in non-traffic offense prosecutions recognizing such errors may be raised for the first time on appeal. *White v. State*, 197 Ga. App. 162, 398 S.E.2d 35 (1990). This court has held the requirement that pleas and waivers be knowing and intelligent applies to misdemeanors as well as felony convictions. *Baldasar v. Illinois*, 446 U.S. 222 (1980).

The jury trial waiver requirement of the Georgia statutory scheme would appear to be but a legislative effort to insure records of convictions affirmatively reflect defendants were accorded their federal and state right to a trial by jury in criminal prosecutions as required by the

decisions of this court construing the 6th & 14th Amendments to the United States Constitution. By its decision in this case and *Nicholson* the Georgia Supreme Court has frustrated that clearly expressed intention and all but ignored the long line of cases disapproving implied waivers in constitutional analysis.

As with the de novo question, even assuming arguendo the Georgia Supreme Court's construction of the statute is correct, due process considerations prevent the application of that interpretation to persons such as the petitioner who were tried before it was rendered. To apply the procedural changes wrought by *Nicholson* to persons such as petitioner violates the fair warning requirements of the constitutional ex post facto prohibitions contained in Article I, Sections 9 and 10 of the United States Constitution. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

CONCLUSION

In this case the Georgia Supreme Court literally changed the rules on the petitioner in the middle of the game. By its decision in this case it retroactively applied a new and constitutionally insufficient standard of review of appeals from courts presided over by non-lawyer judges.

It also retroactively breathed life into a null and void judgment of a court without jurisdiction. Georgia's clear and unambiguous statutory requirement that a waiver of trial by jury be first obtained in an inferior court before jurisdiction attaches was but a legislative embodiment of

the decisions of this court that implied waivers are not acceptable in constitutional analysis. That principle was never more applicable than here where petitioner was not advised of and did not knowingly and intelligently waive his right to have his case heard by a jury. His trial was therefore presumptively unfair.

However, even if the Georgia Supreme Court's construction is correct, the application of these new procedural requirements to this petitioner was wrong and violative of the due process guarantees and ex post facto prohibitions of the United States Constitution.

This court should grant certiorari to consider the compelling questions of constitutional import presented by this case.

Respectfully submitted,

VIRGIL L. BROWN
Counsel of Record for Petitioner

BENTLEY C. ADAMS, III
Counsel for Petitioner

P.O. Box 388
Courthouse Square
Zebulon, Georgia 30295
(404) 567-8970

S91G0170

SUPREME COURT OF GEORGIA

ATLANTA JUL 3 1991

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BY: Hunt, J.

The following direction was given:

TERRY LEE WALTON v. THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on July 3, 1991, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United State, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Willis B. Hunt

Justice Willis B. Hunt, Jr.

SUPREME COURT OF GEORGIA

ATLANTA JULY 03, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91G0170

TERRY LEE WALTON V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

In the Supreme Court of Georgia

Decided: JUN 11 1991

S91G0170. WALTON v. THE STATE.

HUNT, Justice.

Terry Lee Walton was convicted in probate court in Upson County of driving under the influence of alcohol. He appealed to the superior court under the provisions of OCGA § 40-13-28. That court, finding that no written waiver of a jury trial appeared in the record of the probate court, remanded the case to the probate court for a determination of the waiver issue. Walton appealed that order to the Court of Appeals, which held that remand was error and that the superior court should have decided anew whether or not the defendant had formally waived a jury trial and should have then disposed of the matter de novo, either jury or non-jury, depending on its determination of the jury waiver issue. The Court of Appeals remanded the case to the superior court for that purpose. *Walton v. State*, 197 Ga. App. 263 (398 SE2d 221) (1990). We granted certiorari to consider whether Walton could raise the jury waiver issue in the superior court and whether the appellate review by the superior court under OCGA § 40-13-28, is, in fact, de novo.

1. In *Nicholson v. State*, ___Ga.___ (Case No. S91G0119, decided April 11, 1991), this court, deciding that the written waiver of jury trial was a matter of personal, rather than subject-matter, jurisdiction, held, "[i]n those probate court cases in which there is no record that a timely demand for jury trial was made, the right to a jury trial is waived." Once it is waived in the probate

court, the right to a jury trial may not be raised for the first time on appeal to the superior court, *Id.*, or to the appellate court, *Dossett v. State*, ___Ga.___ (Case No. S91G0120, decided May 10, 1991).

Walton did not demand a jury trial in probate court, and, thereby, waived it. *Nicholson v. State*, supra. The Court of Appeals erred in remanding this case to the superior court for further determination of the waiver of jury trial issue.

2. The Court of Appeals also incorrectly held the superior court, upon remand, should try the case de novo. OCGA § 40-13-28 provides:

> Any defendant convicted under this article shall have the right of appeal to the superior court. The provisions of Code Sections 5-3-29 and 5-3-30 shall *not* apply to appeals under this Code section. Otherwise, the appeal shall be entered as appeals are entered from the probate court to the superior court, . . . *The appeal to the superior court shall not be a de novo investigation before a jury* but shall be on the record of the hearing as certified by the judge of that court who presided at the hearing below. [Emphasis supplied.]

OCGA § 5-3-29 provides for de novo investigations in appeals from lower adjudicatories to the superior court;[1]

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[1] OCGA § 5-3-29 provides: "An appeal to the superior court in any case *where not otherwise provided by law* is a de novo investigation. It brings up the whole record from the court below; and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case." [Emphasis supplied.]

OCGA § 5-3-30 provides for jury trials.[2] Despite the proviso that these two code sections are not applicable, the Court of Appeals, in interpreting OCGA § 40-13-28,[3] concluded that appeals from the probate courts are "de novo," although they are not "before a jury," where a jury trial has been waived in the probate court. *Anderson v. City of Alpharetta*, 187 Ga. App. 148, 149 (369 SE2d 521) (1988). We disagree with the Court of Appeals' construction of this statute, and expressly disapprove of language in the case indicating the appeal to the superior court is a "de novo proceeding." *Anderson*, supra, at p. 149.[4]

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[2] OCGA § 5-3-30, as is pertinent here, sets out: "All appeals to the superior court or state court shall be tried by a jury . . . ; provided, however, that trial by jury may be waived by the consent of both parties to trial by the court without a jury as provided in Code section 9-11-39.

[3] The Court of Appeals' inquiry in *Anderson v. City of Alpharetta*, supra, 187 Ga. App. at 149, was focused on whether a discretionary application was necessary under OCGA § 5-6-35 (a)(1), requiring an application for "appeals from decisions of the superior courts reviewing decisions of . . . lower courts by certiorari or de novo proceedings. . . ." The holding in *Anderson*, that an application to appeal is necessary, is not applicable where the case originates in probate court. *Phillips v. State*, ___Ga.___ (Case No. S91G0317, decided April 15, 1991).

[4] We disagree with the distinction drawn by the Court of Appeals between a *de novo investigation* and a *de novo proceeding* and its conclusion that while the superior court review under OCGA § 40-13-28, would be the latter and not the former since the review court was confined, factually, by the record from the lower court, the superior court could, nonetheless, make an independent non-jury *finding* as to guilt or innocence. That

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In enacting OCGA § 40-13-28, the General Assembly provided for a right of appeal "on the record" to the superior court. Thus, the mandate of the superior courts is to review asserted errors of law in the proceedings below under general appellate principles. The appellant may not raise issues not litigated in the court below, but he is entitled to a review of the record which ensures that the evidence has been received in conformity with statutory and constitutional standards and that it supports the conviction, including application of the standards set out in *Jackson v. Virginia*, 443 US 307 (99 SCt 2781, 61 LE2d 560) (1979). If the conviction is properly supported by the evidence, the conviction would stand; if not, an acquittal would be required. The superior court would not, however, make an independent finding of guilt or innocence

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(Continued from previous page)

holding is inconsistent with the statute. It would create a hybrid de novo process by which the review court would hear no original evidence but would take the facts submitted below and make a "de novo" finding as to guilt or innocence, and would do so without considering, for example, the credibility of the witnesses based on their demeanor. The critical question, we believe, is not whether the appeal is jury or non-jury, but whether it is, or is not, on the record. The statute mandates that it is on the record. Such a review is foreign to the concept of an appeal de novo. Upon a review of the record, the superior court is not " . . . the trier of fact, [making] its own determination of guilt." *Anderson*, supra at 149. Its function is similar to the one performed in a worker's compensation review, not by the Full Board, which can find facts anew, but by the superior court, itself, which cannot.

based on the evidence submitted, as would be done were the appeal, in fact, de novo.[5]

Judgment reversed and remanded with direction. All the Justices concur.

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[5] A review on the record from a court without a law-trained judge has been held to satisfy due process in Arizona, *Palmer v. Superior Court In & For Maricopa County*, 560, P2d 797, 799 (Ariz. 1977) and in Wyoming, *Canaday v. State*, 687 P2d 897, 899 (Wyo. 1984). Under our statute the lower court judge shall certify the record but the burden remains on the defendant to ensure that the record includes the issue upon which he or she seeks review as well as the lower court's ruling on such issue.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA JAN 8 1991

Dear Sir:

Case No. S91C0170. Terry Lee Walton v. The State

The Supreme Court today granted the writ of certiorari in this case. All the Justices concur.

THIS CASE WILL BE ASSIGNED TO THE MARCH 1991, ORAL ARGUMENT CALENDAR.

The Court is particularly concerned with the following:

> Whether the absence of a written waiver of jury rendered the probate court's judgment void and, if so, whether remand was the proper course for the superior court.

Briefs filed in the Court of Appeals are included in the record presented to this court. Additional briefs are not required but may be submitted.

Very truly yours,

Joline B. Williams, Clerk

A90A1363 WALTON v. THE STATE.
(398 SE2d 221)

CARLEY, Chief Judge.

Appellant was convicted in the probate court of driving under the influence of alcohol and, pursuant to OCGA § 40-13-28, appellant appealed to the superior court. The superior court determined that the probate court was without authority to try appellant because appellant's written waiver of trial by jury had not been secured. See OCGA § 40-13-23 (a); *Rustin v. State*, 192 Ga. App. 775, 776 (2) (386 SE2d 535) (1989). On this basis, the superior court remanded the proceedings to the probate court with direction that the probate court recall the case and either retry appellant if he waived trial by jury in writing, or bind appellant over for jury trial in the superior court if he did not. Appellant appeals from this order of the superior court.

1. The appeal that is created by OCGA § 40-13-28 is a de novo proceeding. *Anderson v. City of Alpharetta*, 187 Ga. App. 148 (369 SE2d 521) (1988). In such a proceeding, the superior court, following its own applicable procedures, undertakes to address only those issues which the lower court was otherwise authorized to address. *Peavey v. Crawford*, 182 Ga. 782 (1) (187 SE 13) (1936). Thus, if the record had demonstrated that the probate court was otherwise authorized to determine appellant's guilt or innocence, the superior court, exercising the comparable authority of the probate court, but following the applicable procedure of OCGA § 40-13-28, would have been authorized to determine appellant's guilt or innocence by conducting a de novo review of the certified

record of the hearing that had been conducted by the probate court. However, the record demonstrated that the probate court was *not* otherwise authorized to determine appellant's guilt or innocence because there was no written waiver of trial by jury. Accordingly, the superior court correctly held that, on the record before it, it likewise had no comparable authority to determine appellant's guilt or innocence through the procedure mandated by OCGA § 40-13-28.

The question remains, however, whether the superior court correctly remanded the case to the probate court. In a de novo appellate proceeding before the superior court, the "case must be tried anew as if no trial had been had. [Cits.] *It is not the province of the superior court on such an appeal to review and affirm or reverse the rulings of the [probate court], but to try the issues anew and pass original judgments on the questions involved as if there had been no previous trial.*" (Emphasis supplied.) *Hall v. First Nat. Bank of Atlanta*, 85 Ga. App. 498 (3) (69 SE2d 679) (1952). " '[T]he case on appeal from the [probate court] brings the *whole case up for a new hearing' but with the same jurisdiction as was possessed by the [probate court].* [Cits.]" (Emphasis supplied.) *Knowles v. Knowles*, 125 Ga. App. 642, 645 (1) (188 SE2d 800) (1972). It follows that the superior court "erred in remanding the proceedings to the [probate court]. [Cit.]" *Knowles v. Knowles*, supra at 645 (1). The whole case was before the superior court and, exercising the comparable authority of the probate court, the superior court *itself* should have addressed the lack of appellant's written waiver of the wright to trial by jury

on the record before it and should have made the appropriate rulings in that regard just as if no previous proceedings had been held in the probate court. Thus, if the superior court failed to obtain appellant's written waiver of trial by jury, the superior court itself should have placed the case on its own jury trial calendar just as the probate court would be required to bind the case over for jury trial in the superior court. If, on the other hand, the superior court did obtain appellant's written waiver of trial by jury, the superior court itself should have placed the case on its own non-jury trial calendar just as the probate court would be required to conduct a non-jury trial. Accordingly, the superior court's order remanding the case to the probate court is reversed with the direction that the superior court address the issue of appellant's written waiver of the right to trial by jury and make the appropriate rulings in that regard.

2. Appellant's remaining enumeration of error has been considered and found to be without merit.

Judgment reversed and case remanded with direction. McMurray, P. J., and Sognier, J., concur.

DECIDED SEPTEMBER 26, 1990 –
REHEARING DENIED OCTOBER 15, 1990 – CERT. APPLIED FOR.

D.U.I. Upson Superior Court. Before Judge Miller.

Virgil L. Brown & Associates, Virgil L. Brown, Bentley C. Adams III, for appellant.

W. Fletcher Sams, District Attorney, J. David Fowler, Assistant District Attorney, for appellee.